Supreme Court, U. S.
FILED
JAN 14 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
January Term, 1980

No. 79-1096

JUDITH LEIGH PEARSON, Petitioner,

v.

STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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1227 S. W. Military Dr.
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January 9, 1980

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No.

JUDITH LEIGH PEARSON, Petitioner,
v.
STATE OF TEXAS, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

The petitioner Judith L. Pearson respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Texas Court of Criminal Appeals entered on October 17, 1979.

OPINION BELOW

The opinion of the Texas Court of Criminal Appeals and the opinion dissenting to the denial of the petitioner's Motion for Rehearing can be found at 587 S.W.2d 393 and in the appendix.

JURISDICTION

The opinion of the Texas Court of Criminal Appeals was entered on October

17, 1979 when on that date the petitioner's tiemly filed Motion for Rehearing was denied. This court's jurisdiction is envoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Whether the warrantless "murder scene" search of the petitioner's apartment was unconstitutional even though it occurred prior to this court's decision in Mincey v. Arizona, 437 U.S. 385, 98 S. Ct. 2408.

2. Whether handwriting samples taken pursuant to an unconstitutional arrest made for the purpose of gathering evidence should be excluded from use in trial.

STATEMENT OF THE CASE

On April 9, 1976 at 6:30 p.m. Houston Police officers and investigators were called to the petitoner's apartment by the management of the apartment complex where petitioner resided with her three year old daughter Tamara. The call reported a dead body in the petitioner's residence and when they arrived at the scene the security guard let them into the apartment where they observed several persons comforting the petitioner who was crying. They were taken to Tamara's bedroom by the security guard where they found her dead, lying in bed. A note was pinned to her blouse stating "I'm sorry I had to kill such a beutal (sic) little girl in or to (sic) teach you a lesson. Next time it will be you". She was strangled to death.

The officers conducted an immediate search of the entire apartment

(kitchen, two bedrooms, and living room) for evidence (not to determine the presence of additional victims). They had no search warrant, nor did they obtain the petitioner's consent. In the living room they found a folder with several notebooks inside. They took out the notebooks, opened them and read their contents. One notebook contained a story in the petitioner's handwriting. The story described an incident which involved a threat to the petitioner's daughter that occurred two years prior to her actual death. The story was written while the petitioner lived in Georgia. The facts of the story (which was intended for publication) were strikingly similar to the actual killing of Tamara.

The petitoner was arrested at 9:00 p.m. that night and taken to the Houston Police Department. The purpose of this arrest was to obtain her statement (R 239,282). After obtaining her statement the police continued to hold her in the city jail, questioning her for four days (R 282) taking finger prints and handwriting samples and searching her a-

partment (without a warrant). On her fourth day of detention, handwriting samples were taken from her (after giving her the Miranda warnings). It was only then that she was taken before a magistrate (R 320,322). During these four days she was allowed to see only a minister (once) and a friend (once) (R 323).

The petitoner filed a motion to supress the seized notebook citing the unconstitutional nature of the search and seizure as ground for exclusion. This motion was denied by the trial court.

During trial on January 24, 1977 the same objection was raised and overruled. Her motion for new trial cited the failure to exclude the story as a ground for new trial. The motion was denied. The unconstitutional search and seizure of the story was timely raised on appeal to the Texas Court of Criminal Appeals.

The Court of Criminal Appeals in it's opinion of June 21, 1978 agreed that the search was illegal according to Mincey v. Arizona, 437 U.S. 385,

98 S.Ct. 2408, but constured U.S. v. Peltier, 422 U.S. 531, 95 S.Ct. 2313 (1975) to mean that Mincey should not be applied retroactively and affirmed the trial court's judgment. Petitioner filed a timely Motion for Rehearing which was denied.

During trial the petitoner objected to the admission of the handwriting samples on the grounds that they were the fruits of an unconstitutional arrest. The trial court ignored the Fourth Amendment grounds, overruling the objection stating that the taking of handwriting samples did not violate Fifth Amendment guarantees.

REASONS FOR GRANTING WRIT

I. THE DECISION OF THE TEXAS COURT OF CRIMINAL APPEALS CONFLICTS WITH THE DECISIONS OF THIS COURT.

(A) Regarding the unconstitutional search of the petitoner's apartment this court ruled in Mincey that the "murder scene exception" to the search warrant requirement created by the Arizona Supreme Court was not a valid exception and therefore searches relying on it were unconstitutional.

In 1971 the Tex. Ct. Cr. App. created a murder scene exception identical to Arizona's in Brown v. State, 475 S.W.2d 938 (1971).

In it's opinion in the petitoner's appeal the Tex. Ct. Cr. App. held that Mincey did not apply to her case stating "We hold that because the search and trial in this case occurred before the decision in Mincey v. Arizona, supra, when Brown v. State, supra, was still good law, the disposition of the appellant's first ground of error is controlled by Brown instead of Mincey." The Tex. Ct. Cr. App. cited Peltier as authority for this reasoning.

The Tex. Ct. Cr. App.'s opinion conflicts directly with several of this court's opinions by stating that Brown was "good law" at the time of the petitioner's trial.

(1) It conflicts with the Mincey opinion in which this court specifically stated that none of the arguments in favor of the "murder scene" rule persuades us of the validity of the genric exceptions delineated by the Arizona Supreme Court."

(2) It conflicts with this court's opinion in Chimel v. California, 395 U.S. 752, 985 S.Ct 2034 (1969) which held that the scope of a search under an exception to the search warrant requirement must be stricly limited to the circumstances which rendered the search permissable. Since Brown purported to allow a full evidentry search of a residence at the discovery of a dead body, it was in conflict with Chimel and therfore it was not even "good law" at the time of its creation.

(3) In holding that the denial of retroactive effect of Mincey is justified by Peltier, the Tex. Ct.Cr. App. is in direct conflict with Peltier itself.

This court's opinion in Peltier specifically limits its application to cases which "have broadened the exclusionary rule." Mincey did not enlarge defendant's constitutional rights nor did it broaden the exclusionary rule. It is the petitioner's position, supported by Mincey, that the search of her apartment was unconstitutional

even if the Mincey opinion had not been handed down.

The Tex. Ct. Cr. App. construes Peltier as creating a "good faith rule" allowing unconstitutionally seized evidence to be admitted if the searching officers were relying in good faith upon the state of the law at the time of the search.

Actually Peltier dealt with evidence seized in a type of search which had been permitted for years; had consistently withstood judicial challenges; was sanctioned by legislation and; provided for by adminsitrative regulations. The search in the petitoner's case was not sanctioned by legislation or adminisrative regulations and the only court decisions permitting it were in direct conflict with the opinions of this court. Therefore, for the searching officers to have been "relying in good faith" to Brown they had to be in bad faith in respect to Chimel, supra: Coolidge v. New Hampshire 403 U.S. 443, 91 S.Ct 2022 (1971) and Katz v. United States 389 U.S. 347, 88 S.Ct. 507.

(4) Texas is continuing to erroneously apply Peltier and will do so until stopped by this court. See Kemner v. State, cause no. 55,786 (11/79) and NASTU v. State, cause no. 58,059 (10/79) both of which are not published as of now.

(B) In respect to the admission of the handwriting samples, the Tex. Ct. Cr. App.'s opinion is in direct conflict with this court's holding in Davis v. Mississippi, 394 U.S. 721 (1969) and Brown v. Illinois, 422 U.S. 590 (1975).

In Davis this court held that finger prints taken as a result of an unconstitutional arrest were to be excluded from evidence as a fruit of that arrest.

In Brown v. Illinois this court held that a confession taken as a result of an unconstitutional arrest is to be excluded as a fruit of that arrest.

The Brown opinion listed several tests to determine a casual connection between the arrest and the taking of evidence:

(1) The absence of intervening circumstances - In the petitioner's case

the only intervening circumstance was the giving of the Miranda warning which alone is insufficient, Brown v. Illinois, supra.

(2) The flagrancy of the illegal arrest - In the petitioner's case the illegality was flagrant. She was taken to the police station without a warrant or exigent circumstances, no attempt was made to obtain a warrant, she was held for four days before being brought downstairs and charged befor a magistrate, she was allowed only two visits during that period of time.

(3) The purpose of the illegal detention - In the petitioner's case the purpose was to gather evidence. The prosecutor stated during the hearing of the petitioner's objection to the handwriting evidence that "as far as the arrest goes, the evidence is that she was taken from the scene to be questioned and as the circumstances became known she remained in custody" (R 320).

Further, the police did not take her to a magistrate until the moment after they convinced her to give the

handwriting samples.

II. THE OPINION OF THE TEX. CT. CR. APP. TOTALLY IGNORED THE PETITIONER"S ASSERTION OF HER FOURTH AMENDMENT PROTECTION AGAINST UNREASONABLE ARREST, SEARCH AND SEIZURE.

Through out the entire legal process of the trial and appeal of her case the petitioner has asserted that the evidence was taken in violation of her Fourth Amendment rights. The trial court and Tex. Ct. Cr. App. have totally ignored the petitioner's assertion of this right and instead have treated her objection as an assertion of the Fifth Amendment. To allow to stand is to effectively deny the petitioner the protection of the Fourth Amendment which she had repeatedly asked to be enforced. The reported opinion in the petitioner's case will serve as additinal precedent for the continued admission of handwriting samples and fingerprints taken direclty as a result of unconstitutional arrests.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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January 9, 1980

CERTIFICATE OF SERVICE

I hereby certify that on this ____day of January, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to Mr. Carol Vance, District Attorney, Harris County Courthouse, Houston, Texas 77002
I further certify that all parties required to be served have been served.

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APPENDIX

OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS

JUDITH LEIGH PEARSON, Appellant
No. 58,055 vs. ---Appeal from
HARRIS County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for murder; punishment was assessed by the court at life.

The sufficiency of the evidence is not challenged. Although three grounds of error are asserted in the brief, the second was abandoned at oral argument, leaving two issues for consideration in this appeal.

In her first ground of error appellant contends the trial court erroneously admitted papers and writings seized during a search of the homicide scene. As pointed out in her supplemental brief, this search and seizure were in violation of the principle announced in Mincey v. Arizona, _____U.S._____, 98 S.Ct. 2408, 57 L.Ed.2d 290 (197 8). The search was conducted on April 9, 1976, and the trial in this case was in January of 1977. Thus both the search and trial were conducted prior to the decision

in Mincey v. Arizona, supra. At that time the common law "exigency rule" allowed such homicide scene investigations. Brown v. State, 475 S.W.2d 938, 948-950. We are therefore confronted with the question of the retroactive effect of Mincey.

In United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), the court discussed the retroactivity of exclusionary rule cases from the perspectives of both the imperative of judicial integrity and the deterrence rationale:

"Since 1965 this Court has repeatedly struggled with the question of whether rulings in criminal cases should be given retroactive effect. In those cases '(w)here the major purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, 'Williams v. United States, 401 U.S. 646, 653, 91 S.Ct. 1148, 1142, 28 L.Ed.2d 388 (1971), the doctrine has quite often been applied retroactively. It is indisputable, however, that in every case in which the Court has addressed the retroactivity problem in the context of the exclusionary rule, whereby concededly relevant evidence is excluded in order to enforce a constitutional guarantee that does not relate to the integrity of the factfinding process, the Court has concluded that any such new constitutional principle would be accorded only prospective application. Linkletter v. Walker, 381 U.S. 618, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965); Johnson v. New Jersey, 384 U.S. 719, 86 S.Ct. 1772, 16 L.Ed.2d 882 (1966); Stovall v. Denno, supra; Fuller v. Alaska, 393 U.S. 80, 89 S.Ct. 61, 21 L.Ed.2d 212 (1968); Desist v. United States, 394 U.S. 244, 89 S.Ct. 1030, 22 L.Ed.2d 248 (1969); Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969); Williams v. United States, supra, Hill v. California. 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971).

"We think that these cases tell

us a great deal about the nature of the exclusionary rule, as well as something about the nature of retroactivity anaysis. Decisions of this Court applying the exclusionary rule to unconstitutionally seized evidence have referred to 'the imperative of judicial integrity.' Elkins v.United States, 364 U.S. 206, 222, 80 S.Ct. 1437, 1446, 4 L.Ed.2d 1669 (1960), although the Court has relied principally upon the deterrent purpose served by the exclusionary rule. See Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Lee v. Florida, 392 U.S. 378, 88 S.Ct 2096, 20 L.Ed.2d, 1166 (1968), See also United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974); Michigan v. Tucker, 417 U.S. 433, 94 S. Ct. 2357, 41 L.Ed.2d 182 (1974). And see also Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi. L.Rev. 665, 668=672 (1970).

"When it came time to consider whether those decisions would be applied retroactively, however, the Court recognized that the introduction of evidence which had been seized by law enforcement officials in good-faith compliance with then-prevailing constitutional norms did not make the courts 'accomplices in the willful disobedience of a Constitution they are sworn to uphold.' Elkins v. United States, supra, 364 U.S., at 223, 80 S.Ct. at 1447. Thus, while the 'imperative of judicial integrity' played a role in this Court's decision to overrule Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), see Mapp v. Ohio, supra, 367 U.S., at 659, 81 S.Ct. at 1693, the Mapp decision was not applied retroactively: 'Rather than being abhorrent at the time of seizure in this case, the use in state trials of illegally seized evidence had been specifically authorized by this Court in Wolf.' Linkletter v. Walker, supra, 381 U.S., at 638, 85 S.Ct., at 1742 (footnote ommitted). Similarly, in Lee v. Florida, supra, this Court overruled Schwartz v. Texas, 344 U.S. 199, 73 S.Ct. 232, 97 L.Ed. 231 (1952), and held that evidence seized in violation of Sec. 605 of the

Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. Sec. 605, by state officers could not be introduced into evidence at state criminal trials:

"' (T)he decision we reach today is not based upon language and doctrinal symmetry alone. It is buttressed as well by the "imperative of judicial integrity." Elkins v. United States, 364 U.S. 206, 222, (80 S.Ct. 1437, 1446 4 L.Ed.2d 1669). Under our Constitution no court, state or federal, may serve as an acoomplice in the willful transgression of "the Laws of the United State," laws by which "the Judges in every state (are) bound . . ."'
392 U.S., at 385-386, 88 S.Ct. at 2101 (footnotes ommitted).

"But when it came time to consider the retroactivity of Lee, the Court held that it would not be applied retroactively, saying:
"'Retroactive application of Lee would overturn every state conviction obtained in good-faith reliance of Schwartz. Since this result is not required by the principle upon which Lee was decided, or necessary to accomplish its purpose, we hold that the exclusionary rule is to be applied only to trials in which the evidence is sought to be introduced after the date of our decision in Lee.' Fuller v. Alaska, supra, 393 U.S., at 81, 89 S.Ct. at 62.

"The teaching of these retroactivity cases is that if the law enforcement officers reasonable believed in good faith that evidence they had seized was admissible at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. It would seem to follow a fortiori from the Linkletter and Fuller holdings that the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their conduct was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged

in by the law enforcement officials is not permitted by the Constitution. For, although the police in Linkletter and Fuller could not have been expected to foresee the application of the exclusionary rule to state criminal trials, they could reasonably have entertained no similar doubts as to the illegality of their conduct. See Wolf v. Colorado, 338 U.S., at 27, 69 S.Ct. at 1361; Sec. 605 of the Federal Communications Act of 1934; cf. Nardone v. United States, 302 U.S. 379, 58 S.Ct. 275, 82 L.Ed. 314 (1937).

"This approach to the 'imperative of judicial integrity' does not differ markedly from the analysis the Court has utilized in determinging whether the deterrence rationale undergirding the exclusionary rule would be furthered by retroactive application of new constitutional doctrines . See Linkletter v. Walker, supra, 381 U.S., at 636=637, 85 S.Ct., at 1741-1742; Fuller v. Alaska, supra, 393 U.S., at 81, 89 S.Ct., at 62; Desist v. United States, supra, 394 U.S. at 249-251, 89 S.Ct., at 1033-1035. In Desist, the Court explicitly recognized the interrelation between retroactivity rulings and the exclusionary rule; '(W)e simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served.' 394 U.S., at 254-n. 24, 89 S.Ct., at 1036.

"This focus in the retroactivity cases on the purposes served by the exclusionary rule is also quite in harmony with the approach taken generally to the exclsuionary rule. In United States v. Calandra, 414 U.S., at 348, 94 S.Ct. 613, 620, 38 L.Ed.2d 561, we said that the exclusionary rule 'is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.' It follows that 'the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served.' Ibid. We likewise observed in Michigan v. Tucker, 417 U.S., at 447, 94 S.Ct. 2357, 2365, 41 L.Ed.2d 182:

"'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.'"

We hold that because the search and trial in this case occurred before the decision in Mincey v. Arizona, supra, when Brown v. State, supra, was still good law, the disposition of appellant's first ground of error is controlled by Brown instead of Mincey. The ground of error is overruled.

In the other ground of error presented by appellant, she contends that handwriting samples taken from her and used as evidence in the case were the product of an illegal arrest. She argues the arrest was illegal because she was not taken before a magistrate until four days after her arrest and after the handwriting samples were taken. We note that handwriting samples do not violate the privilege against self-incimination, Olson v. State, 484 S.W.2d 756, and that no casual connection between the failure to take her before a magistrate and the taking of the handwriting samples was shown. Hester v. State, 544 S.W. 2d 129. 134-135.

The ground of error is overruled.

The judgment is affirmed.

ODOM, Judge

(Delivered July 3, 1979)
By: Panel 3, 2nd Quarter, 1979, composed of

Wendell A. Odem, Judge
W.T. Phillips, Judge
W.C. Davis, Judge

JUDITH LEIGH PEARSON, Appellant
No. 58,055 vs. ---Appeal from
HARRIS County
THE STATE OF TEXAS, Appellee

DISSENTING OPINION ON THE DENIAL OF APPELLANT'S MOTION FOR REHEARING EN BANC

I cannot agree that Mincey v. Arizona, _____U.S._____,98 S.Ct. 2408, 57 L.Ed.2d (1978), is not retroactive. The Supreme Court in Mincey did nothing more than apply well-established Fourth Amendment law. The opinion in Mincey, 98 S.Ct. at 2412-2413, states:

> . . . The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment -- subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576; also South Dakota v. Opperman, 428 U.S. 364, 381, 96 S.Ct. 3092, 3103, 49 L.Ed.2d 1000 (POWELL, J., concurring); Coolidge v. New Hampshire, 403 U.S. 443, 481, 91 S.Ct. 2022, 2045, 29 L.Ed.2d 564; Vale v. Louisiana, 399 U.S. 30, 34, 90 S.Ct. 1969, 1971, 26 L.Ed.2d 409; Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 1879, 20 L.Ed.2d 889; Trupiano v. United States, 334, U.S. 669, 705, 68 S.Ct. 1229, 1232, 92 L.Ed. 1663. The Arizona Supreme Court did not hold that the search of the petitoner's apartment fell within any of the exceptions to the warrant requirement previously recognized by this Court, but rather that the search of a homicide scene should be recognized as an additional exception.

Several reasons are advanced by the State to meet its "burden . . . to show the existence of such an exceptional situation" as to justify creating a new exception to the warrant requirement. See Vale v. Louisiana, supra, 399 U.S., at 34, 90 S.Ct., at 1971, Jeffers v. United States, 343 U.S. 48, 51, 72 S.Ct. 93, 95, 96 L.Ed. 59. None of these reasons, however,

persuades us of the validity of the generic exception delineated by the Arizona Supreme Court.

. . . , we hold that the "murder scene exception" created by the Arizona Supreme Court is inconsistent with the Fourth and Fourteenth Amendments -- that the warrantless search of Mincey's apartment was not constitutionally permissible simply because a homicide had recently occurred there.[9] (footnote omitted)

Mincey did not announce any new rule of law, or represent a "sharp break in the web of the law." See United States v. Hart, 546 F.2d 798 (9th Cir. 1976). What Mincey did was mend a break in the law caused by a number of cases which gradually evolved into the so-called "murder scene exception" to the warrant requirement. As pointed out in Mincey, this is not and never has been a valid exception to the warrant requirement. It appears tohave evolved from cases which held that a warrantless entry into a home was justified in the event the police had reason to believe that a person was dying or otherwise in need of immediate aid. See United States v. Barone, 330 F.2d 543 (1964);Wayne v. United States, 318 F.2d 205 (1963). This is a recognized exception to the warrant requirement. See Mincey, 98 S.Ct. at 2413-2414. Once inside, the officers may seize incriminating evidence that is in plain view, or inspect the premises to make sure that all danger has passed and the situation is under contol, as these are also recognized exceptions. See Mincey, 98 S.Ct. at 2414. But a general search of the premises for incriminating evidence, after the emergency has subsided, is not and has never been justifiable.

The majority states that at the time of the search in this case the "common law ' exigency rule' allowed such homicide scene investigations,' citing Brown v. State, 475 S.W.2d 938 (Tex. Crim. App. 1971). To the extent that Brown and its isolated companions Tocher v. State. 501 S.W.2d 921 (Tex. Crim. App. 1973), and Corbett v. State, 493 S.W.2d 940 (Tex. Crim. App. 1973),

authorized searches under the "murder scene exception," they were not based on precedent and were clearly contrary to established Fourth Amendment law. It is reasonable to assume that a lawyer familiar with search and seizure law would have recognized these cases as a substantial departure from established law, and could have advised interested parties that these cases represented unsound authority.

I see no reason to retroactively apply such sparse case law that has been open to serious question since its inception. I would hold that since Mincey simply applied existing search and seizure law and stated nothing that we did not know already, it should be applied retroactively. Compare United States v. Hart, supra; United States v. Martinez, 526 F.2d 954 (1976).

United States v. Peltier, 422 U.S. 531, 95 S.Ct. 2313, 45 L.Ed.2d 374 (1975), does not require a different result. The 9th Circuit Court of Appeals had held in Peltier that the decision in Almeida-Sanchez v. United States, 413 U.S. 266, 93 S.Ct. 2535, 7 L.Ed.2d 596 (1973), holding a warrantless border search of an automobile unconstitutional, was to be applied retroactively because the decision overruled not prior Supreme Court decision and reaffirmed established law. In reversing the Ninth Circuit in Peltier, the Supreme Court noted that border searches of the type struck down by Almeida-Sanchez had been upheld by the courts for 20 years. and that the border patrol agents were acting under the express authority of a statute and long-standing administrative regultations. It concluded from this that the officer's conduct in performing the searches and seizures was not "blameworthy." The case law on the "murder scene exception" is sparse, of dubious origin, without statutory approval, and has been openly contrary to established Fourth Amendment law from the beginning. The conduct of the officers in this case cannot be labeled blameless.

Finally, although the Court in Peltier engaged in a general discussion of the retroactivity of exclusionary

rule cases, Peltier did not establish per se rule that cases which extend the scope of the excluiionary rule should not be applied retroactively. To accept it as such would be to adopt just the "mechanical approach" to the issue of retroactivity that the Court in Peltier repudiated.

I dissent to the denial of appellant's motion for rehearing.

PHILLIPS, Judge

(Delivered October 17, 1979)
En Banc